Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Commission's	)	
Regulations and Policies	)	MM Docket No. 92-51
Affecting Investment	)	
in the Broadcast Industry	)	

To: The Commission

COMMENTS

These Comments are filed on behalf of the Parties listed in Exhibit A hereto in response to the portion of the Notice of Proposed Rulemaking Inquiry ("Notice") in the above-referenced proceeding which invited comments on the question of whether the Commission should issue a declaratory ruling to the effect that licenses and other authorizations issued by the Commission (hereinafter collectively referred to as "FCC Licenses") may be pledged as security for loans. As will be shown below, (i) nothing in the Communications Act of 1934 (the "Act"), as amended, precludes the FCC from allowing its licensees and permittees to grant security interests in their FCC Licenses, subject to the restrictions of Section 310 of Act, (ii) allowing security interests to be granted, and taken, in FCC Licenses is not inconsistent with the public interest, and (iii) allowing security interests in FCC Licenses will make financing for communications transactions more readily available and on more favorable terms than is presently the case.

In Bill Welch, 3 FCC Rcd 6502 (1988), the FCC undertook an extensive and careful re-examination of its long standing policy

that FCC Licenses are not "property rights" and concluded that an FCC License confers on the holder a valuable, though "defeasible," right. The FCC further concluded that nothing in the Act precluded the FCC from allowing the holder of a bare FCC License to sell his or her "defeasible rights" under the License for whatever price such rights would bring in the marketplace, provided that such sale was otherwise consistent with the public interest.

If the Commission's decision in Bill Welch represents a correct interpretation of the Act, which the Parties hereto believes it does, then it logically follows that nothing in the Act precludes the Commission from allowing holders of FCC Licenses to grant security interests in such licenses subject, of course, to all of the limitations and restrictions imposed on the holder of the "defeasible rights" in the License by the Act. In other words, if an FCC License confers on the holder valuable "defeasible rights," those rights, like similar rights granted by other Federal and State authorities (e.g., landing slots granted by the FAA, liquor licenses), can be pledged as security for loans under the Uniform Commercial Code.

The question then is not whether the Act prohibits security interests in FCC Licenses. That question has, in effect, been answered in the affirmative by the statutory analysis that the FCC undertook in Bill Welch. Indeed, it would be illogical for the FCC to hold that bare FCC Licenses confer rights that can be

sold, outright, for whatever price they will command in the market, but that these same rights cannot by hypothecated by their holders for the purpose of enabling the holder to obtain financing to construct and operate the very sort of communications facilities for which the License was issued. Thus, the only question that remains to be considered is whether there is a valid public interest reason for not permitting FCC Licenses to be pledged as security. The following discussion will show that not only is there no public interest reason for prohibiting security interests in FCC Licenses, but that the public interest will be served by allowing such security interests.

Approximately 25 years ago, in Radio KDAN, 11 FCC 2d 934, on reconsideration, 13 RR 2d 100 (1968), the Commission stated, without explanation, that a pledge of an FCC License as security for a loan would enable the lender to exercise undue influence over the licensee/borrower. Therefore, the FCC held that it would be contrary to the public interest to permit Licenses to be pledged as security for loans. The fact is, however, that whatever influence a lender has over a licensee/borrower exists by virtue of the loan documents. Before, and since, Radio KDAN, lenders have been making loans to broadcast and other communications companies secured by asset pledges, personal guaranties, stock pledges, and exhaustive loan covenants. The influence and leverage that lenders exercise over licensees flows

from the totality of the rights granted to the lender under the loan documents. That this is so is evidenced by the number of consensual foreclosures, receiverships and voluntary and involuntary bankruptcies that have occurred during the recent period of financial distress in the broadcast industry. While it is undeniable that allowing lenders to acquire security interests in licenses would change the relationship between the lender and the borrower/licensee and the lender and the borrower/licensee's other creditors in a bankruptcy situation and might, thereby, alter the calculus that lenders and borrower/licensees use to assess their legal options when a loan goes into default, it is also undeniable that the absence of security interests in licenses has not deterred lenders from exercising substantial and effective "influence" over licensee/borrowers that default under their loans.

The arguments of Capstar Communications ("Capstar") and the Motion Picture Association of America ("MPAA") as to why permitting security interests in licenses would be detrimental to the public interest cited at ¶20 of the Notice are without merit. Contrary to Capstar's contention, there is no risk that "possession of a security interest will enable lenders to gain a property right that is independently enforceable outside the bounds of the Commission's statutory control, such as in a state court, creating chaos for the Commission as it attempts to carry out its regulatory function." The rights conferred by granting a

security interest in an FCC License will be no greater than, and subject to the same statutory and regulatory restrictions as, the License itself. The Act, and the Commission's exclusive authority with respect to the issuance, transfer and assignment of Licenses issued under the Act, are sufficient to insure that federal and state courts will not take any actions with respect to FCC Licenses that are the subject of bankruptcy or state insolvency proceedings that are inconsistent with the Act and the FCC's policies. Such is the case today. See, In Re TAK Communications, Case No. MM11-91-00031 (Bankr W.D. Wis. Sept. 24, 1991), aff'd Case No. 91-C-935-C (W.D. Wis. Mar. 23, 1992). And such will be the case if the FCC permits Licenses to be pledged as security.

It is true, as MPAA points out, that the present policy of not permitting FCC Licenses to be pledged work to the benefit of unsecured creditors, such as program suppliers, in the event of the bankruptcy of a broadcast licensee. This is so because, in bankruptcy, the portion of the debt owed to a lender that has a first security position in all of a licensee/borrower's assets which is attributable to the value of the FCC License is treated as an unsecured loan, thereby placing the secured lender on the same footing with respect to a substantial portion of its loan as the licensee/borrower's unsecured creditors. But the fact that the present policy results in a lender with a first security position in all of the assets of a licensee/borrower being placed

in the same status as a general creditor with respect to a significant portion of its loan does not provide a public interest justification for continuing the prohibition against security interests in Licenses. Quite the contrary, the distortion of creditor relationships which results from prohibition underscores why it is in the public interest for the Commission to allow FCC Licenses to be pledged as security for loans.

If the senior lender to a broadcast company runs a serious risk that it will be treated as a general creditor with respect to a substantial portion of its loan in a liquidation or reorganization, the practical consequence of this will be that banks and other financial institutions will avoid lending to the broadcast industry, and those that lend at all, will only lend less as a percentage of valuation, and will lend at higher rates, than would the case if their loan could be secured by the value of the FCC License. This is not mere economic theory. It is a fact which is evidenced by the withdrawal of banks and other financial institutions from lending to the broadcast industry. On the other hand, if primary lenders are accorded the full security of the FCC Licenses, as well as the other assets of broadcast companies to which they lend, program suppliers such as the MPAA and others who extend credit to broadcast companies on an unsecured, or junior secured basis, will surely continue to do so. Suppliers to the broadcast industry, including the MPAA, as

a group will obviously be better off if the industry can obtain commercial financing on reasonable terms than they would be if the sources of financing for the industry were limited and costly.

As the Commission itself recognized, Notice ¶3, "[g]iven the significance of the domestic broadcasting industry to the economy, it is vitally important that [its] regulatory programs be as minimally burdensome on investment in the industry as possible consistent with [its] statutory mandate." As the Commission surely realizes, the cost and availability of financing, whether for real estate, inner city development, or broadcasting, depends on the level of risk. The greater a potential lender's concern about the risk that a loan may not be repaid, the less inclined the lender will be to make the loan, and the higher the interest rate the lender will demand.

Even during the halcyon years in the 1980s when the broadcast industry was prospering, and prices for broadcast were rising steadily, only a small number of banks and financial institutions which had developed specialized communications lending divisions were willing to make loans to the broadcast industry. The reason for this was that banks and financial institutions evaluate the risks of loans based on the ascertainable value of the hard assets that a borrower proposes to pledge as security for the loans. Since the bulk of the value of a broadcast station is based on the discounted present value

of future anticipated cash flows resulting from the quasi monopoly conferred by the FCC License pursuant to which a station operates, and since the principal asset of a station, its FCC License, cannot be pledged, traditional asset based lenders have been unwilling even to consider broadcast loans, unless such loans were fully secured by tangible assets unrelated to the value of the FCC License.[1/]

The collapse of many of the financial institutions that had specialized in non-asset based communications lending, coupled with the collapse of station values attributable to depressed cash flows, has driven virtually all of the financial institutions that were willing to make cash flow based loans to broadcasters out of the market. At the same time this has been happening, there have been developments in the field of bankruptcy law which have underscored, and more clearly delineated, the risks associated with lending to broadcast and other communications companies. These developments pertain to

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1/ It is for this reason that broadcasters are rarely able to secure financing based on the value of their stations from their local banks. If FCC Licenses could be pledged to secure loans, there is every reason to believe that local banks would be willing to make loans on the basis of the appraised value of broadcast stations. The willingness of local banks to make broadcast loans would be of particular help to small broadcast companies that have traditionally found it almost impossible to obtain conventional loans because their local banks will not lend without the licenses as security and because the banks which specialized in broadcast lending would not consider loans of less than several million dollars.

the treatment of "undersecured" creditors in bankruptcy proceedings brought under Chapter 11 of the Bankruptcy Code.

In a bankruptcy, if the bulk of the value of a broadcast station is attributable to its FCC License, a lender is likely to find itself "undersecured." The consequences of being "undersecured" are that (i) during the entire period of a Chapter 11 re-organization, the lender is not entitled to any interest or other payments with respect to its loan and (ii) as part of a re-organization, the lender can be required to accept a reduction in the principal amount of its secured loan to the value of the security underlying the loan. See United Savings Assoc. of Texas v. Timbers of Inwood Forest Assoc., 484 U.S. 365 (1988). In other words, a lender that makes a loan to a broadcast company based upon a cash flow valuation of the company runs the risk that, if the loan goes into default and the borrower seeks protection under Chapter 11, the lender will not only have to forego the interest on the principal sum during the period that a reorganization plan is being formulated, but that a substantial portion of the principal of the loan will be wiped out as part of a court-approved reorganization plan. Faced with these realities, banks and other financial institutions have understandably exited the field of communications lending. They are not likely to return to the field unless and until FCC Licenses can be pledged to secure their loans, and, thereby, afford them the same sort of protection from being undersecured

at the time of a bankruptcy that they can obtain with other types of asset based lending.

In view of the fact that the Act does not preclude the Commission from allowing security interests to be granted, and taken, in FCC Licenses, and the fact that permitting such security interests will serve the public interest by reducing the risk on loans to communications companies, thereby making such loans more widely available and at lower rates than is presently the case, the Commission should issue a declaratory ruling that FCC Licenses may, in the future, lawfully be pledged as security for loans and other obligations.

So as not to alter the contractual rights of parties who entered into transactions at a time when the taking, or granting, of security interests in licenses was clearly prohibited, it is important that the declaratory ruling permitting licenses to be pledged be clearly framed as being a change in the FCC's policies regarding the legality of security interests in licenses, and, thus, only applicable to security interests granted after the date of the ruling. A ruling that had retroactive effect would not only disturb existing contractual relationships, but it would result in a torrent of litigation over whether the terms of existing loan documents could be interpreted to permit lenders to take advantage of a retroactive declaration that security interests in licenses are not prohibited by the Act.

Respectfully submitted,

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Counsel for the Parties listed in
Exhibit A hereto

Date: June 12, 1992

EXHIBIT A

The Parties

Silverado Broadcasting Company, the proposed assignee of Stations KWG(AM), Stockton, California and KSGO(FM), Tracy, California and Stations KAQQ(AM) and KISC(FM), Spokane, Washington.

The various Benchmark Radio Acquisition Fund Limited Partnerships own and operate Stations WDOV(AM) and WDSD(FM), Dover, Delaware; WUSQ-AM/FM, Winchester, Virginia; WZNY(FM), Augusta, Georgia; and WVGO(FM), Richmond, Virginia.

Bradmark Broadcasting Company, licensee of Stations WSTL(AM)/WENU(FM), Glens Falls, New York and applicant for a new FM station in Queensbury, New York.

KBOM, L.P., licensee of Station KBOM(FM), Los Alamos, New Mexico.

Eugene Hill, an individual, former owner of KSHA, Redding, California.

Dolphin Communications, Inc. licensee of Station KUIK(AM), Hillsboro, Oregon and parent of the licensee of Stations KPRB(AM) and KSJJ(FM), Redmond, Oregon.

Mountain View Broadcasting, licensee of Station WXXK(FM), Newport, New Hampshire.

CERTIFICATE OF SERVICE

I, LESLIE A. GUILFOYLE, a secretary in the law office of Arent, Fox, Kintner, Plotkin & Kahn do hereby certify that a copy of the foregoing **COMMENTS** has been sent via U.S. Mail, First-Class postage prepaid this 12th day of June, 1992 to the following:

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Washington, DC 20554

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LESLIE A. GUILFOYLE

*** Hand Delivered**